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CCBE RESPONSES TO THE QUESTIONS OF THE EUROPEAN COMMISSION ON THE FUTURE OF THE INTERNAL MARKET

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Introduction

The CCBE – which through the national Bars and Law Societies of the Member States of the European Union and the European Economic Area represents more than 700,000 European lawyers – would like to thank the European Commission for providing it with the opportunity to give its opinion on the future of the internal market. The internal market of lawyers is *per se* a continuous and core issue of the work of the CCBE in as much as it concerns the freedom to practise as a lawyer. As a matter of fact, the “CCBE Free Movement of Lawyers Committee” - a working group which has been established for a long time - raises problems linked to the freedom to practise as a lawyer. For information, the work undertaken by the CCBE can be accessed on its website: www.ccbe.org.

However, the CCBE would have preferred that the present consultation, and in particular, the issue of free movement of services, be undertaken before the draft Services directive or, at least, during the discussions during its adoption process. Given these circumstances, the CCBE raises doubts as to the real objective of this consultation and the consequences for the profession. Such a consultation would have been of particular relevance as the Commission does not share the opinion of the European Parliament on the exclusion of lawyers from the scope of application of the Services Directive. Besides, one should take account of the fact that the Commission is considering in the near future a ten-year review of the application of the Directive 98/5 on the free establishment of lawyers.

In this respect, responses to the questionnaire will deal only with the internal market for lawyers which has been regulated until now by a sectoral, liberal, and efficient regime taking into account the specificities of the profession and governed by Directives 77/249/EC and 98/5/EC which have been successfully implemented for a long time. The CCBE thinks that the possible amendments and improvements of the internal market for lawyers should be based on the *acquis communautaire* which establishes a regime of free movement of the legal profession, this regime being one of the most liberal in the world.

Responses

Question 1: Do you agree with the preliminary analysis of the current situation of the internal market and the challenges it is facing? If not, what is your analysis?

Generally speaking, the CCBE agrees with the analysis of the situation made by the European Commission. However, the general assessment does not apply to the legal profession (regarding observations referring to the incompleteness of the internal market).

a) There are also some specificities in the use of cross-border legal services by citizens. A client would not contact a lawyer established in another Member States because his/her fees are lower. On the contrary, he will choose a lawyer for reasons of trust, because he/she thinks the lawyer is competent and often also because the latter is established in the judicial district where the issue is located. Besides, if legal problems encountered involve jurisdictions of several Member States (hence several bars) the client will often have to consult several providers, each of them having the legal background and specialized knowledge required regarding his/her Member State and Bar.

As far as the activity of representation before courts is specifically concerned, the rules applicable depend strictly on national regulations and considerations of general interest recognised by community law.

Conseil des barreaux européens – Council of Bars and Law Societies of Europe

association internationale sans but lucratif

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b) As for enlargement, according to data available, the market of lawyers has felt less impact than forecast and generally the bars of the 25 Member States apply sectoral norms with success. This statement applies also to the bilateral agreement between Switzerland and Member States of the European Economic Area.

c) With regard to technology, the CCBE "IT Law Committee" works on improving the recognition of systems and on promoting electronic signatures. In this respect, it is possible to insert a chip on the CCBE identity card for lawyers. However, it is important to point out that some national initiatives (such as electronic ID) can be a barrier to the cross-border practice of these professions.

d) Finally, the CCBE would like to call on DG Internal Market to take account in its reasoning, as it did in the past, of non-economic values of the legal profession in order to avoid creating protectionist reflexes at the national and local levels in a profession which is, by definition, liberal and liberalised by conviction.

Question 2: In which ways have you benefited from the opportunities offered by the internal market? Where, in your view, does it function well? Where do you see shortcomings?

Having regard to the shortcomings of the internal market, the CCBE is aware of only a limited number of cases which were referred to the relevant community institutions as they could not be solved through conciliation or national court decisions.

Other questions are raised within the CCBE "Free Movement of Lawyers Committee" which intervenes very efficiently as a consultative body for home and host Bars, and resolves amicably and satisfactorily differences and disputes which have proven to be limited in number and in substance.

As far as its success is concerned, statistical data, which are available on the website of the CCBE (http://www.ccbe.org/en/documents/stat_en.htm), show an increase in the number of lawyers who benefit from free establishment, and more recently to the possibility to access the home title under Article 10 of Directive 98/5/EC.

Question 3: Do you agree with this choice of priorities? Are there others in your view?

In the opinion of the CCBE, it is necessary to

- 1) (re)build mutual confidence with and within the profession;
- 2) find the best regulation possible (and not a possible better regulation) with Bars while respecting and promoting appropriate self-regulation;
- 3) promote rules of good practices and help to improve the system(s) of mobility of liberal professions, notably for young professionals.

The CCBE is itself already working effectively towards these goals.

Question 4: Internal market policy fosters economic reforms to which citizens and businesses then have to adjust. Do you think sufficient account is taken of the costs of making these adjustments? Why (not)? Do you think flanking measures are needed to accompany market opening? If so, what kind?

The cost of setting up, and the application of, a sectoral system is exclusively borne by the profession, i.e. both bars and lawyers. Assistance could always improve the system but is not essential to its good functioning.

Question 5: In your experience, does the internal market offer sufficient opportunities for businesses? Why (not)? Where do you see barriers?

Yes, the internal market offers good opportunities for law firms and lawyers with limits which are proper in the practice of the profession and closely linked to the administration of justice and the application of mainly national legislation. These opportunities depend upon a great variety of factors (languages, knowledge of law, special field of law practised, clients, etc.).

Question 6: Do you consider that the internal market is 'innovation-friendly'? Why (not)? Where, in your view, are the main barriers to innovation? Which steps should be taken in order to ensure that the internal market is more innovation-friendly?

Yes. This has been recently shown by a conference on "e-communication and lawyers" which was organised by the CCBE in cooperation with the Consejo General de la Abogacía Española (CGAE) in Madrid on 15 December. It dealt with the mutual recognition of electronic systems established by bars and the recognition and authentication methods of electronic signatures. The video of the conference is available on the website <http://cgae.iuriline.net/ccbe/retransmission.aspx>.

Community funding programmes could indeed encourage the setting up of new technologies among liberal professions to improve exchange of experience and information.

Question 11: Do you think that voluntary standards for services would be beneficial? If so, in which sectors should they be introduced?

The legal profession already set up in 1988 a Code of Conduct enabling to solve problems which may occur in a cross-border relationship with fellow lawyers or with clients. This Code is regularly revised, notably this year again. The profession would like to establish common core principles which would apply not only to cross-border relations, but also at national level enabling to give the consumer a unique reference of community lawyers' deontology.

The CCBE would also like to point out the excellent work on this issue made by the Council of Europe through its Commission for the efficiency of justice (see http://www.coe.int/T/E/Legal_Affairs/Legal_cooperation/Operation_of_justice/Efficiency_of_justice/) and opinion poll of external (clients) and internal (lawyers) opinion made by some national bars.

Question 12: What are your views on how we carry out consultations on internal market policy? For instance, what are your views on the consultation process, and on the relevance and presentation of issues in our consultation documents?

The CCBE is very grateful with regard to the consultation work undertaken by the European Commission and in particular DG Internal Market, but proposes some improvements:

- consultations are made *ex tempore* ;
- they often put forward the interest of businesses against that of citizens;
- they are sometimes too oriented towards pre-determined conclusions;
- they do not sometimes preserve multilingualism;
- on some occasions, they need to improve transparency;
- on some occasions, they need deepening or clarity.

The legal profession is very open to reports enabling comparison of national systems and analysis of possible improvement and progress within the legal profession itself.

The legal profession does not criticise the initial step of the Commission itself which led to its reports on the application of competition to professional services, but regrets that the European Commission

developed a view of the profession which is too focused on economics and ignores its specificities. The legal profession regrets insufficient dialogue with the European Commission.

Question 13: What are your views on the way we carry out impact assessments on internal market policies? In your experience, are we using the right policy instruments to achieve the objectives?

It is a principle of better regulation that existing legislation should be evaluated before new proposals are made on the same subject matter. The CCBE believes that it would be practical and beneficial for the Commission to undertake evaluations prior to proposing, and concluding, new Directives. For example, the Commission proposed a third Money Laundering Directive before evaluating the impact of the second Money Laundering Directive. Such an approach would have been more logical and practical, as the results of the evaluation, and any problems which have come to light as a result of the evaluation, could be addressed in future Directives.

The CCBE also believes that with regard to questionnaires, many of the issues raised by questionnaires are complex and do not easily lend themselves to simple 'yes' or 'no' responses, but would be best discussed in a forum open to all stakeholders. We would therefore urge the Commission to follow up on consultation with public hearings and/or meetings where it will be possible to discuss the issues at hand in more depth.

Finally, we would like to insist on the fact that some assessments are neither necessary, nor justified to the extent that they are carried out after a legislative modification (evaluation of the second Money Laundering Directive after the adoption of the third one) or the approval of a Directive (the forthcoming consultation on the application of Directive 98/5/EC will be made after the approval of the Services Directive) and as such cannot objectively bring a sufficient benefit to justify them.

Question 15: Do you think that Member States should be encouraged to carry out national screening exercises (of existing and new rules and administrative procedures) and if so how?

As a general rule, in the area of competition, the CCBE considers that reviews of the profession must mainly take place at national level in the sectors where there are shortcomings further to serious and detailed studies taking account of questions of general interest and others. However, as sectoral Directives show, in the area of the internal market, the CCBE can, and wants to, continue to improve the European system.

Question 16: In which fields do you see the greatest need to step up cooperation between Member State authorities in order to make the internal market work?

The CCBE is working on having more national delegations represented within its "Free Movement of Lawyers Committee". At the same time, the CCBE strengthens mutual trust between these members and gives opinions on issues relating to the applicability of community law which are submitted to it. Its opinions are not binding but enjoy very important moral authority. In this respect, governmental contributions may be welcomed to the extent that they may respect and improve the independence of the profession and its freedom to exercise.

Question 17: What is your assessment of the role and work of supervisory or regulatory authorities in Member States? Should similar systems of supervision be extended to other internal market fields?

Very positive. Most cases are solved through conciliation between bars and lawyers concerned.

Question 18: What is your view on current mechanisms for enforcing internal market rules at the national level? What should be improved?

The dissemination of information within the profession should be improved.

Question 19: What is your experience (if any) of the Commission's infringement policy in the field of the internal market? Which type of infringement cases should we handle as a priority?

A number of cases have been referred to the relevant community institutions as they could not be solved through conciliation or national court decisions.

Questions relating to the right to establish should be given priority.

Question 20: Do you agree with the need to step up coordination and responsibility in Member States for managing the internal market? What (further) assistance could the Commission give in this respect?

Assistance as such is not necessary. Promotion of the network SOLVIT and the good functioning of infringement procedures are appreciated among the profession.

Question 21: In your experience, does internal market regulation take sufficient account of the bigger picture of international competitiveness? If not, in which areas do you see problems and what could be done?

No. It would be a good idea if DG Internal Market would carry out a detailed and responsible analysis on the controversy of the Services Directive taking account of the objectives of Lisbon. In this analysis, account should be taken of the final result, and the impact on the ratification process of the European Constitution.

For European lawyers, who have a more liberal cross-border regime than exists domestically in the United States, the horizontal approach, which was promoted in the current draft of the Services Directive, is negative and will not significantly improve competitiveness at an international level.

Question 22: On which regulatory issues and with which countries and regions should the EU strive for more international regulatory convergence or equivalence? How should this be achieved? By contrast, where do you think differing rules and standards should coexist?

At first sight, it is preferable to deepen convergence with countries which share cultures and legal systems similar to those of the Member States as well as those of big economic powers. Yet, as long as law remains national, different rules and standards of the legal professions will co-exist.

Question 24: In your experience, do Member States and the EU institutions do enough to promote the opportunities presented by the internal market? Which concrete actions would you suggest for improving the situation?

In general, yes.

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